Case and Comment

NOTES OF

RECENT IMPORTANT, INTERESTING DECISIONS

INDEX TO ANNOTATION OF THE LAWYERS' REPORTS, ANNOTATED

LEGAL NEWS NOTES AND FACETIÆ

VOL. 8. FEBRUARY, 1902. NO. 9.

CASE AND COMMENT

Monthly. Subscription, 50 cents per annum post-paid. Single numbers, 5 cents.

THE LAWYERS' CO-OPERATIVE PUB. CO.,
Rochester, N. Y.

NEW YORK, 79 Nassau St. CHICAGO, 116 Monroe St.

Entered at postoffice at Rochester, N. Y., as second-class mail matter.

A Censorship of Philanthropy.

One of those surprising propositions that men of prominence sometimes advocate, and which, with all due deference to their presumed wisdom, are clearly unwise and ill considered, appears in a report of a recent talk by Dr. Felix Adler on "The New Attitude toward Wealth." As reported he says, in discussing the gifts by rich men for philanthropic purposes: "It is a question whether the wealthy should be allowed to dispose of their vast fortunes according to their own ideas, or should be required to subordinate their judgment to the counsel and direction of wise and thinking men." After taking as an illustration the possibility that a wealthy man interested in science should leave his wealth to give every family in Chicago a microscope, he says: "Such a benefaction would fail of its end. Therefore I think it would be much better to leave the disposition, or rather the application, of such bequests to others who know the needs of the masses." No doubt there is some unwise giving. No doubt the donor attempts to prescribe methods and details for his gift sometimes when he might far better leave these things to the discretion of organizations existing for the general purposes that the donor has in view. The wiser those who make great benefactions may be the better; but Dr. Adler does not stop with the idea of trying to enlighten them and induce them to act wisely. His proposition is that they "should be required to subordinate their judgment to the counsel and direction of wise and thinking men."

Who are the wise and thinking men whose judgment should control? There are those who would regard themselves as filling this description who might not be universally accepted as such. Some men of great prominence who sincerely regard themselves as "wise and thinking men," and who would doubtless be so regarded by many other people, are far from wise or safe guides. It is a matter of the commonest observation to those who are acquainted with the *personnel* of public and quasi-public bodies in which questions of public importance are discussed, that very frequently some of those who attain the greatest prominence by virtue of keeping themselves always at the front and persistently announcing their opinions with emphasis and assurance are not men whose judgment can be relied upon. Yet to superficial or merely casual observers these men would appear wise, and they often acquire much reputation. If some "wise and thinking men" were to be made censors of public gifts, such men as these would be put forward, by their friends, of course, as the ideal censors, and they would stand much chance of being selected in place of far wiser men who have less persistently exploited themselves before the public.

The idea that the public must regulate every matter of individual action on which there is a possibility that mistakes may be made if men

are left free to follow their own judgment seems to be a very seductive one to many people. The supposition that some men of infallible judgment, not only might be, but surely will be, found to take the official position, seems to be made as a matter of course. The evils that might result from the unwise and arbitrary decisions of officials in such cases are entirely lost sight of. But, after all, it may be useless to discuss propositions of this sort. It is practically certain that no such preposterous scheme as this will ever be adopted, unless, at least, philanthropic gifts shall first be made of a more preposterous character than anyone would suppose possible, and on so large a scale as to interest the whole public. "Wise and thinking men" whose counsel and direction control great charitable gifts are by no means lacking to-day, though they have not been appointed to that duty by legislative authority. They include the men themselves who have made the fortunes which they are distributing. But they also include the very wisest of men, whose lives are given to the service of their fellow men, but whose counsel is sought and valued and followed by those who have great sums of money that they wish to use for the best good of the world.

Employers' Liability Bill.

The proposed law to regulate employers' liability, which is under consideration by the New York legislature, recently had an important amendment inserted. It provides "that every existing right of action for negligence or to recover damages for injuries resulting in death is continued, and nothing in this act shall be construed as limiting any such right of action, nor shall the failure to give notice, provided for in § 2 of this act, be a bar to the maintenance of a suit under any such existing right of action." This is greatly to be commended. The employers' liability bill which was introduced, but failed of passage, last year or the year before, if we remember its provisions correctly, though nominally in the interest of employees, seemed much more likely to relieve employers from some of their existing liabilities than to furnish valuable new remedies to their employees. The laws passed on this subject in different states are ostensibly in the interest of the workmen. It is not likely that any member of the legislature will present a bill which is on its face, and is explicitly declared to be, for the relief of employers from their existing liabilities. If a statute having such an effect is to be enacted, it should be done with a full understanding of its effect. When a bill is offered for the declared purpose of providing new or enlarged remedies for employees it is not uncommon for some of its provisions to have, by implication or otherwise, an effect that was not foreseen by some who supported it on the supposition that it was in the interest of the workmen. Whatever may be the provisions, therefore, of a statute on this subject, if it is not intended to take away any of the existing rights of employees, it should contain a provision substantially like that which is now included, by the above amendment, in the bill under consideration at Albany.

Reciprocal Prescriptive Easements.

The supreme court of Minnesota, in Kray *v.* Muggli, 54 L. R. A. 473, has promulgated a doctrine which, if pushed to its legitimate conclusion, will effect some unlooked-for results, and require a readjustment of popular ideas with regard to easements. In that case it appeared that a pond had been created by a dam across a stream, which had been maintained until a prescriptive right had accrued. Meanwhile owners of land bordering on the pond made improvements with reference to the changed conditions created by the dam. After the expiration of the prescriptive period, persons representing the dam owner attempted to remove the dam, and were enjoined by the court on the ground that the riparian owners had acquired a reciprocal right to have the new condition of the stream maintained for their benefit. The question at once arises, Does the Minnesota court intend to commit itself to the doctrine that if an easement acquired by prescription is beneficial to the servient estate, the law will preserve and protect it for the benefit of such estate against the interest of the dominant estate? If A acquires a prescriptive right to have his eaves drip upon B's property, can B, merely because he has utilized such drip for irrigation purposes, prevent A from removing his building so that B may continue to enjoy the advantage of the drip? Of course, the court would disavow any such intention. But where is the distinction between the case supposed and the case decided? The court expressly states that it adopts the contention of plaintiffs that there grew out of the relations between the parties with respect to the construction and maintenance of the dam,

reciprocal rights and privileges,—the right on the part of the defendants to maintain it, and the right on the part of the plaintiffs to insist that it be maintained. This doctrine is said to be analogous to that which prevents the restoration to its ancient course of a stream which has been changed therefrom, or which prevents the abandonment of a street or park after purchases have been made with respect to it. The doctrine with respect to abandonment of parks and highways is plainly distinguishable, but the court says that there can be no difference in principle between cases where the natural channel of a stream is changed and diverted and those where a permanent obstruction is placed therein. By reference to the cases collected in the note to Pewaukee v. Savoy, 50 L. R. A. 836, it will be seen that the decisions which prevent a return of diverted streams to ancient channels are placed on a higher ground than that of reciprocal easements. A stream of water is a natural highway, and as an artificial highway, for which a new course has been maintained for the prescriptive period by acquiescence of the abutting owners, cannot be restored to its ancient track against the objection of an abutter, so a watercourse which has been changed by acquiescence for the prescriptive period cannot be restored to its ancient channel against the objection of a riparian owner. But does this doctrine apply to a change of the condition of the water or its depth within its channel? As shown by the above note, the authorities very generally agree that it does not. In considering this question a distinction, apparently overlooked by the Minnesota court, must be kept clearly in mind. The court cited, in support of its ruling, Smith v. Youmans, 37 L. R. A. 285. In that case the owner of the dam, without abandoning his prescriptive easement, sought to maintain the water at a different and lower level than he had been accustomed to do. This he plainly could not do because the rule is uniform that the owner of the dominant estate cannot change his easement to suit his own convenience, but must keep strictly within his right. That is, however, very far from holding that he cannot abandon his easement entirely should he wish to do so. The Minnesota court evidently felt the difficulty of the situation, because it says: "It may be doubted whether the millowner could be compelled to maintain the dam in good repair. No principle of law making it his duty to do so now occurs to us. But it is not so clear but that the riparian owners . . . would have the right to enter upon the property and repair any defects in the dam and keep and maintain it in order and repair at their own expense." There certainly does not seem to be any principle of the law which will require the owner of a prescriptive right to flow upper riparian property, or to pond water to be used in dry times to maintain his dams and reservoirs for the benefit of those against whom the right has been obtained, unless the facts show a contract, an estoppel, or a dedication to public use forbidding him to do so, none of which appeared in the Muggli Case. It has been generally considered that an adverse use was necessary to the acquisition of a prescriptive easement; that merely accepting the benefit of a condition created by another gave no rights against him. In short, that the owner of the servient estate gained no right by acquiescence which he could enforce against his aggressive adversary. And such is believed to be the law generally with respect to the acquisition of prescriptive easements. No reason appears why the general rule should not apply to the ponding of water. Outside of the apparently untenable theory of reciprocal easement the court seems to rely mostly upon the doctrine of estoppel. But the stated facts do not make out a case for the application of that doctrine.

Effect of Attempted Repudiation upon Right to Participate in Assignment for Creditors.

The interesting question how far a creditor may go in attempting to overthrow his debtor's assignment for creditors, and still be permitted to come in and claim under it, is fully considered in a note to McLaughlin v. Park City Bank, 54 L. R. A. 343. Of course it is clear that if the attack is successful, the doctrine of election will preclude any subsequent claim of benefit under or through the assignment. When, however, the creditor merely asserts rights superior or paramount to the assignment, without assuming an attitude hostile to it, the success of his claim will not necessarily preclude his asserting rights under it. There are authorities, however, to the effect that a vendor who repudiates the sale and replevies the goods cannot, upon failure to find them all, keep what he finds and claim under the assignment for the balance of the purchase price, since by so doing he assumes

inconsistent positions with regard to the sale, although he may not directly attack the assignment. Upon the direct question whether or not a creditor, who has exhausted his remedies in seeking to overthrow the assignment and failed, can, nevertheless, come in under it, the authorities are in direct conflict. The weight of authority is perhaps against his right to do so. These rulings are variously placed on the doctrine of estoppel and election of remedies. But in order to be so precluded he must act with full knowledge of the facts. There are courts taking the opposite view of the question upon the ground, as stated by one court, that a mere attempt to pursue a remedy or claim a right to which a party is not entitled and without obtaining any legal satisfaction therefrom, will not deprive him of the benefit of that which he had originally a right to resort to or claim. The antagonistic positions of the courts upon this question seem to depend upon the view that they take of the general doctrine with respect to the relation between inconsistent remedies. If the mere commencement of an action attacking the assignment, though unfounded in fact or law, be deemed the election of a remedy, such remedy is inconsistent with a claim under the assignment, and will exclude such claim. Otherwise it will not. In case the attacking proceedings have not yet terminated, the creditor will still be precluded from coming in under the assignment in jurisdictions where the attack on the assignment is an election of remedies. The courts are not agreed upon the effect of the pendency of the attacking proceedings in jurisdictions where the attack is not of itself an election of remedies.

Frontage Assessments in Minnesota

A correspondent from Minnesota writes in reference to the memorandum in the December CASE AND COMMENT of the decision in Ramsey County *v.* Robert P. Lewis Co. 53 L. R. A. 421, stating that an assessment for a local improvement upon abutting property according to frontage is held not to be unconstitutional as a taking of property without due process of law. He fears this may be interpreted to mean that the supreme court of that state agrees with what CASE AND COMMENT has persistently contended is an unjust and unconstitutional doctrine, that local assessments can be made without regard to benefits. He points out that the supreme court of that state is fully committed to the contrary doctrine, and in this particular case had held that a frontage assessment for water pipes was unconstitutional, following the doctrine of Norwood *v.* Baker, 172 U. S. 269, 43 L. ed. 443, but on rehearing after the decision in French *v.* Barber Asphalt Paving Co. 181 U. S. 324, 45 L. ed. 879, the decision was reversed and the statute sustained, because the court was in doubt as to the effect of the decisions of the United States Supreme Court, and because, by sustaining the statute, as it says, "the property owners may cause our conclusion to be reviewed by the proper final tribunal, whereas such privilege would be denied the city were the former ruling adhered to."

State Rights in Rivers.

The pending suit by Kansas against Colorado to prevent the appropriation of the waters of the Arkansas river in Colorado, to the detriment of the people of Kansas, is described by Platt Rogers, of Denver, Colorado, in his paper before the American Bar Association, which met in Denver a few months since, as an application to the Supreme Court of the United States "for relief from the courage, skill, and enterprise of Colorado in reclaiming the desert lands of the Arkansas valley, and causing the same to produce the succulent alfalfa, the prolific sugar beet, and the luscious Rocky Ford melon." He asks, "What is the matter with Kansas?" and predicts that "the only result of this assault upon the doctrine of title by appropriation to beneficial uses will be its final and complete establishment by the judgment of the Supreme Court of the United States as the great law of arid America." Until the case is decided it will not be necessary to assume that Kansas has no case, although the general doctrine of prior appropriation is well established in the arid regions of the west. The suit is likely to have the good effect, at least, of sharply emphasizing the supreme question with respect to the development of vast regions that are now a mere desert. If sufficient water could be provided for irrigating all the lands that are now barren, those lands alone would doubtless be sufficient to furnish homes and sustenance for a population far greater than our entire nation at the present time. It does not seem possible that there is water enough to be had for all this, but it is certainly possible to increase greatly the present area of fertility, if the possible water sup-

ply is used to the best advantage. The Federal government is called upon to take hold of this problem, and it ought to do so. But if the head waters of interstate rivers are to be controlled for purposes of irrigation, some highly important questions may arise as to the relative extent of state and Federal authority, as well as the relative rights of the states with respect to each other. It will be fortunate if the case of Kansas *v.* Colorado shall substantially settle these questions.

Index to Notes

IN

LAWYERS' REPORTS, ANNOTATED.

Book 54, Parts 1 and 2.

Mentioning only complete notes therein contained, without including mere reference notes to earlier annotations.

are vice principals; generally; (2) train despatchers represent the company as to special orders suspending regular time-tables; (3) doctrine that train despatchers are not vice principals; (4) liability of railway companies for the negligence of servants who transmit the orders or see that they are carried out; (*n*) duty to impart information as to permanent dangers normally incident to the work at the time it is entered upon; (*o*) duty to impart information as to permanent dangers superadded to the environment after the work has begun; (*p*) duty to warn as to dangers of the transitory class occasionally supervening during the progress of the work; (*q*) duty to inspect instrumentalities; generally; (*r*) duty to inspect instrumentalities at the time they are first brought into use; (*s*) duty to inspect instrumentalities during the time they are kept in use; (*t*) duty to inspect instrumentalities belonging to another person, but temporarily used by the master; (IV.) nonliability of the master for negligence of co-servants in respect to the details of the work: (*a*) generally; (*b*) supervision of details not a master's duty; (*c*) merely transitory perils; master not bound to protect the servant against; (*d*) dangers caused by the progress of the work; master not bound to protect servant against; (*e*) preparation or care of instrumentalities; master not responsible for, where these functions are a part of the work to be done; (*f*) negligent use of safe appliances by fellow servant; master not responsible for; (*g*) *rationale* of doctrine exempting master from liability for negligence in carrying out the details of the work; (*h*) pleading: (1) declaration; (2) plea; (*i*) instructions; (*j*) functions of court and jury in passing upon evidence; (*k*) explanation of classification of the cases cited in the ensuing sections; (V.) negligence of co-servant involving merely the use of the instrumentalities; master not responsible for: (*a*) orders respecting the use of the instrumentalities: (1) generally; (2) order accompanied by an assurance of safety; (*b*) choice of particular methods of work; (*c*) disposition of the force of employees available for the work in hand; (*d*) assigning servants to work for which they are unfitted; (*e*) negligence in sending servants into abnormally dangerous places without warning; (*f*) failing to warn servants as to dangers arising from the execution of the details of the work; (*g*) absence from the post of duty; (*h*) selecting an imperfect appliance from the stock available; (*i*) failing to use the instrumentalities furnished by the master; (*j*) negligence in failing to discard a defective for a suitable instrumentality; (*k*) using instrumentalities in a manner not contemplated nor authorized by the master; (*l*) giving of signals; (*m*) negligence in carrying out the express orders or regulations of the master: (1) cases of the nonobservance or inadequate observance of general rules; (2) cases of negligence in carrying out specific orders; (*n*) failure to give instructions; (*o*) negligence in manipulation of the instrumentalities during the progress of the work: (1) handling railway cars and locomotives; (2) operating hand cars; (3) improperly placing the loads on railway cars and other vehicles; (4) unloading railway cars or other vehicles; (5) manipulating switches; (6) failing to prevent the movement of heavy pieces of machinery; (7) operating hoisting machinery; (8) operating machinery in sawmills; (9) operating a fire hose; (10) starting machinery without warning; (11) moving heavy articles; (12) causing or allowing heavy objects to fall; (13) failing to prevent explosions; (14) work of blasting; (15) failing to keep floors clean; (16) exposing the servant to excessive heat; (17) failing to keep place of work properly ventilated; (18) failing to keep place of work properly lighted; (19) exposing servant to peril from uncovered hatchways or other dangerous openings; (20) handling ships in docks; (21) navigating ships; (22) driving horses; (*p*) negligence in the transmission of the master's orders to other servants; (VI.) negligence of co-servant in respect to the preparation or structural modification of instrumentalities or their parts; when not imputed to the master: (*a*) introductory; (*b*) negligence which produces structural unsafety of a temporary character: (1) defects in railway tracks; (2) displacement of guards provided for dangerous machinery; (3) dangers supervening in excavation work; trenches, mines, quarries, etc.; (4) dangers arising from the changing condition of buildings and other structures while in course of erection or repair; (5) dangers incident to the demolition of buildings; (*c*) negligence in failing to adjust or secure instrumentalities or their parts while in use; (*d*) negligence in the preparation of temporary structures or other instrumentalities as a part of the work; general rule: (1) application of the rule in case of scaffolds, stagings, etc.; (2) application of the rule in the case of other instrumentalities; (*e*) *rationale* and limits of a master's exemption from liability for the adjustment or preparation of instrumentalities; (*f*) special circumstances not affecting the extent of the master's liability: (1) superior rank of the delinquent employee; (2) similarity or dissimilarity of the work in which the delinquent and injured servants were engaged; (3) completion of appliance before plaintiff began to work; (*g*) when the delinquency is deemed not to be in respect to the details of the work: (1) appliance furnished by the master in person; (2) implied undertaking to supply instrumentality in a completed condition; (3) suitable materials not furnished; (4) servants not left free as to the selection of the materials; (5) permanent character of the instrumentality relied upon; (6) adjustment treated as a nondelegable function; (7) operation not one of the transitory class; (VII.) negligence of co-servants whose duty it is to keep the instrumentalities in proper condition; when not imputed to the master: (*a*) theory that a

master is never liable for negligence in regard to inspection and repairs; (*b*) theory that the liability of the master depends on the subject-matter of the inspection or repairs neglected: (1) inspection and repair of railway tracks; (2) inspection and repair of rolling stock; (3) inspection of rolling stock belonging to other companies; (4) inspection and repair of other kinds of machinery; (5) inspection incidental to the details of blasting work; (6) inspection of loads on railway cars; (*c*) master liable where the delinquent servant was engaged in a different class of work; (*d*) negligence in failing to replace an unsound by a sound appliance, when master not liable for; (*e*) all employees engaged in repairing regarded as co-servants of each other; (VIII.) doctrine as to the details of work not a protection to the master when his own negligence or that of a vice principal was an efficient cause of the injury: (*a*) master liable where he or his vice principal directed the details of the work; (*b*) master liable where his own negligence intervenes as a proximate cause between a delinquent co-servant's negligence and the injury; (*c*) master liable where his own antecedent negligence and a subsequent delinquency of a co-servant are both efficient causes of the injury; (*d*) illustrative cases as to concurrent negligence: (1) in respect to an order or other official act of a vice principal by virtue of his rank; (2) in regard to the nonperformance of a statutory duty; (3) in respect to a defective roadbed or railways; (4) in respect to defective switches; (5) in respect to dangerous objects close to railway tracks; (6) in respect to defective bridges; (7) in respect to the improper making up of trains; (8) in respect to the want of proper lighting of the place of work; (9) in respect to uncovered machinery; (10) in respect to defective scaffolds; (11) in respect to other abnormal dangers of the place of work; (12) in respect to defective railway cars; (13) in respect to defective locomotives; (14) in respect to defective hand cars; (15) in regard to defective machinery of other kinds; (16) in respect to the employment of suitable servants; (17) in respect to the failure to employ an adequate number of servants; (18) in respect to a defective system; (19) in respect to seeing that regulations are duly carried out; (20) in respect to the failure to notify as to abnormal dangers; (*e*) master's liability determined with reference to the question whether the co-servant's delinquency did or did not break the chain of causation: (1) no break in the chain of causation; (2) chain of causation deemed to have been broken: (*a*) legal cause of the injury held not to be an official act of negligence on the part of a vice principal; (*b*) defects in structures or other dangers of the place of work; (*c*) defects in machinery; (*d*) unfitness of the delinquent co-servant; (*e*) inadequate number of servants; (*f*) defective regulations 33

Among the New Decisions.

Animals.

See MUNICIPAL CORPORATIONS.

Assignment for Creditors.

An attachment creditor, claiming that an assignment for creditors is fraudulent as to him, and maintaining a hostile attitude toward the receiver of the estate, and allowing the receiver to insure the attached property for the benefit of the estate, is held, in McLaughlin *v.* Park City Bank (Utah) 54 L. R. A. 343, to have no right, after money is collected on the insurance policy, to claim a trust in his favor on account of his attachment on the burned building, which might have satisfied his execution had it not been burned.

Bankruptcy.

The voluntary conveyance by an insolvent for the use of his wife, without actual fraud, of all his real estate, the value of which is not greater than is subject by law to a homestead exemption, is held, in *Re* Tollett (C. C. A. 6th C.) 54 L. R. A. 222, not to deprive him of the right to have the homestead set off to him in a bankruptcy proceeding, in case he obtains a reconveyance after the adjudication of his bankruptcy, and includes the land in his schedule of property.

Building and Loan Associations.

While a building association may fix a minimum premium, payable in advance or in periodical instalments, it is held, in Gray *v.* Baltimore Building & Loan Assc. (W. Va.) 54 L. R. A. 217, that such premium must be a lump sum, certain and definite, and not a percentage payable for an indefinite time, at fixed periods.

Carriers.

Injury to a passenger caused by the overturning of a car is held, in Southern Pacific Co. *v.* Tarin (C. C. A. 5th C.) 54 L. R. A. 240, to render a railroad company liable where it leaves her in the car without warning because she cannot understand the language in which other passengers are warned, after the engine has been overturned by a washout, and water is running along the track in such a way as to

undermine one side of it and render the overturning of the car probable.

Charities.

A bequest by name to an unincorporated educational society which has an existing organization governed by a constitution and by-laws, and officers to conduct its business affairs and carry out its objects, is held, in *Re* Winchester (Cal.) 54 L. R. A. 281, to be valid.

Conflict of Laws.

That a judgment for alimony in a divorce proceeding is subject to alteration from time to time by the court which rendered it, is held, in Trowbridge *v.* Spinning (Wash.) 54 L. R. A. 204, not to prevent its being a final decree which may be enforced in the courts of another state.

Contracts.

A party to a contract who has received and retained the benefits of a substantial partial performance by the other party, is held, in Kauffman *v.* Raeder (C. C. A. 8th C.) 54 L. R. A. 247, to have no right to rescind the contract because of the breach of complete performance by the other party, but he is held to be limited to compensation therefor in damages.

Corporations.

Minority stockholders of a corporation, who, by filing an equitable petition against it and its officers, succeeded in enjoining it from doing *ultra vires* acts which would have required the expenditure of money, are held, in Alexander *v.* Atlanta & W. P. R. Co. (Ga.) 54 L. R. A. 305, not to be entitled to a judgment for their attorneys' fees against the corporation, when the litigation did not result in the recovery of any property, and the corporation itself repudiated the efforts of the plaintiffs to thus protect its interests, and, in defense to their petition, contended that the acts in question were not *ultra vires*, but authorized by its charter.

Covenants.

A covenant in a conveyance of land for a college campus, that it shall be devoted exclusively as a part of the campus, and that no building shall be erected thereon except those devoted to university purposes, is held, in Los Angeles University *v.* Swarth (C. C. A. 9th C.) 54 L. R. A. 262, not to be broken by the placing thereon of sheds, engines, oil tanks, etc., for exploration for oil supposed to be beneath the surface, where such occupation will probably be temporary, and the general purposes of the grant may be materially advanced by the pecuniary results of the development.

Druggists.

Negligence in putting up a prescription is held, in Burgess *v.* Sims Drug Co. (Iowa) 54 L. R. A. 364, to render a druggist liable for injuries caused thereby, although the negligence is that of a registered pharmacist employed by him, which class alone is allowed by statute to fill prescriptions.

Evidence.

Evidence of good character, while not a defense, is held, in Daniels *v.* State (Del.) 54 L. R. A. 286, to be a circumstance tending to strengthen the legal presumption of innocence, and to be weighed and estimated by the jury according to the weight of the testimony by which it is supported in connection with that to which it is opposed.

Forgery.

An instrument in the following form: "Mr. Sage: Please let this boy have a single rig—a good one—and oblige. I will bring it back myself. (Signed) George Clinger,"—is held, in Hickson *v.* State (Neb.) 54 L. R. A. 327, to be the subject of forgery.

Guardian and Ward.

A contract binding upon the ward, or upon his estate, however beneficial to the ward it may be, is held, in Andrus *v.* Blazzard (Utah) 54 L. R. A. 354, to be beyond the power of a guardian, and to impose a personal liability upon himself.

Husband and Wife.

See CONFLICT OF LAWS.

Insurance.

The existence of a law imposing upon a son the duty of supporting his father in case

is running along the track in such a way as to

the latter becomes unable to support himself, is held, in Life Insurance Clearing Co. *v.* O'Neill (C. C. A. 3d C.) 54 L. R. A. 225, to give the son no insurable interest in the father's life, in the absence of any expenditures, past or prospective, towards such support.

An assignment of a policy upon a person's own life to another having no insurable interest is held, in Chamberlain *v.* Butler (Neb.) 54 L. R. A. 338, to be lawful if done in good faith, and not by way of cover for a wager policy.

Landlord and Tenant.

A stipulation in a lease of a farm for a term of years, that all property of every kind and description belonging to the tenant that shall be on the premises, or brought thereon during the term of the lease, shall be held as security for the payment of the rent, and that there shall be a lien on the same for the payment of such rent, is held, in Brown *v.* Neilson (Neb.) 54 L. R. A. 328, to be ineffectual to create a lien for rents due and in arrears, on the crops grown on the leased premises, and other property not *in esse* at the time of the lease, but afterwards brought thereon by the lessee.

Levy.

An attachment levied on real estate fraudulently alienated by the attachment debtor, even though the legal title of record is in another, is held, in Westervelt *v.* Hagge (Neb.) 54 L. R. A. 333, to create a lien in favor of the attachment creditor upon the interest of the debtor in the land attached, which he may enforce by appropriate proceedings after recovering a judgment.

Liens.

See LANDLORD AND TENANT.

Limitation of Actions.

In case a defendant, once a resident of the state, departs and resides out of it before a personal judgment against him, the time of his residence abroad is held, in Hogg *v.* Hartley (W. Va.) 54 L. R. A. 215, not to excuse the judgment from the statute of limitations, although he was a resident when the cause of action on which the judgment rests, arose or accrued.

Master and Servant.

A foreman authorized to purchase, inspect and direct the use of lumber for the temporary structure of a bridge which his employer is engaged in constructing is held, in LaFayette Bridge Co. *v.* Olsen (C. C. A. 7th C.) 54 L. R. A. 33, to represent the master in respect to the duty of inspecting to ascertain if the lumber used is reasonably suitable for the purpose intended, so as to render the master liable for injuries to other employees due to failure to perform that duty.

Municipal Corporations.

A municipal corporation owning land on a navigable lake and its non-navigable outlet is held, in New Whatcom *v.* Fairhaven Land Co. (Wash.) 54 L. R. A. 190, to have no right to appropriate the waters of the lake for a municipal water supply, even under permission of the state, to the injury of a riparian owner whose rights vested before the adoption of the state Constitution, which asserted ownership in the state of the beds of all navigable lakes, but provided that it should not debar any person from asserting his claim to vested rights.

Under statutory authority to prevent the running at large of dogs, a municipal corporation is held, in Gibson *v.* Harrison (Ark.) 54 L. R. A. 268, to have a right to exact a fee for the privilege of keeping a dog, and, in case of its nonpayment, to impose a fine upon the owner and provide for the killing of the dog.

Negligence.

See also DRUGGISTS; TRIAL.

The owner of an uninclosed lot adjacent to a highway in a thickly populated part of a city, who leaves unguarded thereon a heavy section of cement pipe of unstable equilibrium, which is an attractive plaything for children to roll about, and who knows that they resort there for that purpose, is held, in Kopplekom *v.* Colorado Cement Pipe Co. (Colo.) 54 L. R. A. 284, to be liable to a child who is injured by the pipe toppling over on him while he is playing with it.

One who makes an excavation upon his land is held, in Savannah, F. & W. R. Co. *v.* Beavers (Ga.) 54 L. R. A. 314, not to be bound to so guard it as to prevent injury to children who come upon the premises without his invitation, express or implied, but who are in-

duced to do so merely by the alluring attractiveness of the excavation and its surroundings.

One who beat a horse in violation of a statute for prevention of cruelty to animals is held, in Osborne v. VanDyke (Iowa) 54 L. R. A. 367, not to be able to escape liability for an injury caused by a blow falling on a bystander, on the ground that he used reasonable care to avoid the accident, which was caused by the shying of the horse and the slipping of his own foot, and that such result of his acts was not anticipated.

Nuisance.

A public nuisance consisting of a fence across a navigable stream is held, in Griffith v. Holman (Wash.) 54 L. R. A. 178, not to be abatable at the suit of a private individual, unless he has some special interest in the abatement different from and greater than the interest of the community.

Save as to those things which are, by the common or statute law, declared to be nuisances, or which are in their very nature palpably and indisputably such, it is held, in Western & A. R. Co. v. Atlanta (Ga.) 54 L. R. A. 294, that a municipal corporation has no legal right summarily to compel the abatement of a particular thing or act as a nuisance, without reasonable notice to the person alleged to be maintaining the same, of the time and place for hearing and determining whether such thing or act does in law constitute a nuisance.

Officers.

The killing by a deputy sheriff of a person under the mistaken belief that he is one for whose arrest on a charge of felony he has a warrant, and that the killing is necessary to prevent his escape, is held, in Johnson v. Williams (Ky.) 54 L. R. A. 220, to render the sheriff liable on his bond where the statute provides that he shall be liable on his bond for any misconduct or default of his deputies.

Officials in charge of the financial affairs of a county are held, in Daniel v. Putnam County (Ga.) 54 L. R. A. 292, to have no authority to purchase vaccine matter and to make the cost of the same a charge against the county.

Pilots.

A vessel having no propelling power of her own, and in charge of a tug having on board a licensed pilot, is held, in Newton v. The Carrie L. Tyler (C. C. A. 4th C.) 54 L. R. A. 236, to be subject to the provisions of a state statute requiring vessels entering a certain port to take a licensed pilot, or, in case of refusal, to pay his regular fee.

Public Money.

See TAXES.

Set Off.

A creditor of an insolvent debtor, who bids in the debtor's property at an execution sale for an amount in excess of the judgment, is held, in Meherin v. Ambrose (Cal.) 54 L. R. A. 272, to have no right to set off his claim against the amount of his bid to which the debtor is entitled.

Street Railways.

See TRIAL.

Taxes.

Ocean-going tug boats are held, in Northwestern Lumber Co. v. Chehalis County (Wash.) 54 L. R. A. 212, not to be exempt from taxation by the state in whose waters they are exclusively employed, by the fact that they are registered and taxed at a port in another state where their owner is domiciled.

The promotion of the construction and operation of mills and factories to manufacture sorghum cane into sugar or syrup is held, in Dodge v. Mission Township (C. C. A. 8th C.) 54 L. R. A. 242, to be a private purpose, and not a public one which will authorize the creation of a public debt to be paid by taxation.

Trial.

The question whether or not a boy ten years old is guilty of negligence contributing to his injury is held, in Roberts v. Spokane Street R. Co. (Wash.) 54 L. R. A. 184, to be for the jury, where at a street crossing he attempts to ride a bicycle across street railway tracks, and in so doing passes behind one car and comes immediately in front of another approaching from the opposite direction, which, because of its defective condition, cannot be stopped in time to avoid collision with him.

In an action for the death of a child, the father, as administrator, being plaintiff, it is

held in Tucker *v.* Draper (Neb.) 54 L. R. A. 321, to be error to instruct the jury that contributory negligence of the father is no defense.

Usury.

See BUILDING AND LOAN ASSOCIATIONS.

Waters.

One attempting to float logs down a stream is held, in Watkins *v.* Dorris (Wash.) 54 L. R. A. 199, to be liable to an abutting owner for injuries to his land by a jam caused by the careless manner of driving the logs.

New Books.

"An Historical and Legal Digest of All the Contested Election Cases in the House of Representatives from the First to the Fifty-sixth Congress, 1789–1901." By Chester H. Rowell. (L. C. P. Co., Rochester, N. Y.) $4.

"Kerr on Insurance." (Keefe-Davidson Co., St. Paul, Minn.) $6.

"By-Laws of Private Corporations." By Louis Boisot. 2d ed. (Keefe-Davidson Company.) $3.

"Wilgus on Private Corporations." (Bowen-Merrill Co., Indianapolis, Ind.) 2 Vols. $10.

"Martin's Mining Cases." With Annotations, Collection of B. C. Mining Acts of Practical Utility, and Glossary of Mining Terms. (The Carswell Co., Toronto, Ont.) Vol. 1. 1858–1901. $12.

"A Treatise of the Law Relative to Merchant Ships and Seamen." By Charles, Lord Tenterden. 14th Ed. By J. P. Aspinall, B. Aspinall, and H. S. Moore. (Little, Brown, & Co., Boston, Mass.) 2 Vols. $20.

"Coffey's Probate Reports." Vol. 2. (Bancroft-Whitney Co., San Francisco, Cal.)

"Treadwell's Annotated Constitution of California." (Bancroft-Whitney Co.) 1 Vol. $4.

"Brand's Justices' Code of the State of Washington." (Bancroft-Whitney Co.) 1 Vol. $5.

"James's Mechanics' Liens, with Supplement, 1901." (Bancroft-Whitney Co.) 1 Vol. $4.50.

"The Legacy Tax Law." With Digest of Court and Treasury Decisions. (A. S. Pratt & Sons, Washington, D. C.) $.50.

"Continuous Law Book Catalogue." A List and Impartial Outline of the Law Books of All Publishing Houses. (Fiske & Co., Springfield, Ill.) $3.25. Continuations, per year $1.50.

"The Law of Witnesses in Pennsylvania." By Wm. Trickett. (T. & J. W. Johnson & Co., Philadelphia, Pa.) 1 Vol. $6.

"Bender's Lawyers' Diary for 1902." (Matthew Bender, Albany, N. Y.) $2.

"Miscellaneous Writings of the Late Hon. Joseph P. Bradley." With a Review of His Judicial Record by Wm. Draper Lewis and An Account of His Dissenting Opinions by A. Q. Keasbey. Edited and Compiled by Charles Bradley. (L. J. Hardham, Newark, N. J.) 1 Vol. $3.

"The Law of Real Property." By Grant Newell. (T. H. Flood & Co., Chicago, Ill.) 1 Vol. $4.

"A Commentary on the Mechanics' Lien Law of Illinois." By Charles T. Farson. (Callaghan & Co., Chicago, Ill.) 1 Vol. $4.

The Medico-Legal Journal of New York has published a copyrighted group of the present bench of the New York Court of Appeals which is suitable for framing and will be furnished to the profession at $1 per copy.

"A Great Chancellor and Other Papers." By James L. High. With a Sketch of the Author's Life by Edwin Burritt Smith. (Callaghan & Co., Chicago, 1901.) $2.50.

The great chancellor who forms the subject of the first of these papers is Lord Eldon. The second, entitled "A Great Advocate," is on Lord Erskine. An address on "The Origin and Growth of the High Court of Chancery" follows. After this come some miscellaneous addresses and papers entitled "The Professional Outlook," "My Most Remarkable Professional Experience," "The Bar," "The Evolution of the Mugwump," and several others, including some memorial addresses. The high character and the fine literary quality of the author appear even in the briefest of these papers, which will all be read with keen pleasure. The biographical sketch of Mr. High by Edwin Burritt Smith was first read before the Chicago Literary Club, of which both were members. It is a fine tribute from one who had known him long and intimately.

Recent Articles in Law Journals and Reviews.

"The Evolution of the Corporation."—13 American Legal News, 5.

"Solidarity of Interest as Basis of Legality of Boycotting."—11 Yale Law Journal, 153.

"The Sources, Growth, and Development of the Law Maritime."—11 Yale Law Journal, 143.

"The Right of Self-Defense."—11 Yale Law Journal, 127.

"The Lawyer of To-day."—Northwestern Lawyer, October, 1901.

"Constitutional Prohibition of Local and Special Legislation in Pennsylvania."—40 American Law Register, N. S., 687.

"Liability of Telegraph Companies—To Sender, Addressee, and Third Party."—54 Central Law Journal, 23.

"Improper Remarks and Conduct of Trial Judges as Reversible Error."—54 Central Law Journal, 2.

"A Proposed Abolition of the Common Law."—64 Albany Law Journal, 16.

"A Solution of the Trust Problem."—64 Albany Law Journal, 7.

"Reforms in Legal Procedure—(1) Service of Summons."—64 Albany Law Journal, 3.

"Corporation Law."—23 National Corporation Reporter, 652.

"Legislation and Judicial Decision."—11 Yale Law Journal, 95.

"The Treaty Making Power under the Constitution."—11 Yale Law Journal, 69.

"Is a Contract in Restraint of Trade Sustainable as an Independent Contract?"—35 American Law Review, 836.

"Power of the General Government to Protect Its Officers, and to Control Anarchy."—35 American Law Review, 807.

"Instructions to the Jury."—7 Virginia Law Register, 521.

"The Lawyer's Place in the Empire."—38 Canada Law Journal, 10.

"Privity of Contract."—38 Canada Law Journal, 3.

"The Proposed Penal Code of the United States."—14 Green Bag, 12.

"Military Crime and Its Treatment."—5 Law Notes, 189.

"Liability of Attorneys for Ignorance of Law."—5 Law Notes, 184.

"Mistake in the Law of Torts."—15 Harvard Law Review, 335.

"The Law of Capacity in International Marriages."—15 Harvard Law Review, 382.

"Public Service Company Rates and the Fourteenth Amendment. II."—15 Harvard Law Review, 353.

The Humorous Side.

"KODAK" EDUCATION.—A judge's little daughter, who had attended her father's court for the first time, was very much interested in the proceedings. After her return home she told her mother: "Papa made a speech and several other men made speeches to twelve men who sat all together, and then these twelve men were put in a dark chamber to be developed."—*Pittsburg Chronicle.*

WANTED HIS RIGHTS PROTECTED.—For that purpose the following notice was posted where interested parties would be presumed to see and obey it:

NOTICE.—In consideration that M. W. and R. F. D—— of Springville, N. Y., did take possession on the night of April the 12th, 1897, of a portion of the estate of the late Robert D——, whereupon joint action was instituted before the people. "See filings at Clerk's Office at Erie and Cattaraugus Counties, N. Y.," then following, M. W. D—— did chattel mortgage crops on same to Earnest D——, thereby shutting off Frank D—— from receiving any remuneration for services rendered where he was equally entitled with any other person living. Thus by clouding of title and still later by compromising over possessions to Martha D——, wife of M. W. D——, and Earnest D—— makes the magnitude and degree of their illegitimate departure from first start of constitutional action subject beyond all their earthly possessions to the people.

That is to allege that all their holdings are illegitimate. They cannot legitimately transfer otherwise than that the recipients become co-jointly liable to the people's verdict, unless they place as in tender equitable, acceptable vouchers, subject to the people's verdict which will be inauguratively presented, petitioned for in the present oncoming campaign in pursuance of the original constitutionally inaugurated action of April 29th, 1897.

Springville, N. Y., July 31st, 1900.

Frank D——, as one of the People;
In the name of the People; For the People.

WANTED IT STRUCK OUT.—A young Chicago lawyer, becoming somewhat excited on a recent trial as he saw one of the counsel on the other side speaking to another, jumped up and frantically called to the judge, "I object, your Honor, I object to the counsel speaking to his assistant, and move that it be stricken out."